SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

October Term, 1974

No. 73-1881

ERNEST RENDA CONTRACTING CO., INC.
a corporation of New Jersey,

Petitioner,

-vs-

RAYMOND E. MALE, Commissioner, Department of Labor and Industry, State of New Jersey and HILLSBOROUGH MUNICIPAL UTILITIES AUTHORITY, Township of Hillsborough, County of Somerset, State of New Jersey,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No.

ERNEST RENDA CONTRACTING CO., INC.
a corporation of New Jersey,

Petitioner,

-vs-

RAYMOND E. MALE, Commissioner, Department of Labor and Industry, State of New Jersey and HILLSBOROUGH MUNICIPAL UTILITIES AUTHORITY, Township of Hillsborough, County of Somerset, State of New Jersey,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

Petitioner respectfully prays that a writ of Certiorari issue to review the final decision of the Supreme Court of New Jersey upholding the constitutionality of N.J.S. 34:11-56.25 et seq.

OPINIONS BELOW

The trial court, Chancery Division of the Superior Court of New Jersey held that as applied to this petitioner, N.J.S. 34:11-56.25 et seq. was unconstitutional as it improperly delegated to private parties the power to set "prevailing wage rates" effecting third persons including Petitioner. The Appellate Division of the

New Jersey Superior Court reversed the trial court's determination regarding the constitutionality of N.J.S. 34:11.56.25 and the New Jersey Supreme Court affirmed the Appellate Division decision. Copies of all three decisions are annexed as A-1, A-2, A-3.

JURISDICTION

The final decision of the New Jersey Supreme Court was decided on January 22, 1974 and is appended as A-3.

The jurisdiction of this court is invoked under 28 U.S.C. 1257(3).

QUESTIONS PRESENTED

1. WHETHER N.J.S. 34:11-56 ET SEQ. VIOLATES THE DUE PROCESS CLAUSE OF THE 14TH AMENDMENT TO THE UNITED STATES CONSTITUTION.

   A. As improperly delegating the power to set wage rates to private groups.

   B. As being arbitrary and capricious and without any standards.

   C. As being devoid of any procedural safeguards such as notice requirement, hearing requirement and right to review.

CONSTITUTIONAL PROVISIONS INVOLVED

Due process clause of the 14th Amendment to the United States Constitution:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; . . . nor shall any State deprive any person of life, liberty or property, without due process"

STATE STATUTE INVOLVED

N.J.S. 34:11-56.25.

> "It is declared to be the public policy of this State to establish a prevailing wage level for workmen engaged in public works in order to safeguard their efficiency and general well being and to protect them as well as their employers from the effect of serious and unfair competition resulting from wage levels detrimental to efficiency and well-being."

N.J.S. 34:11-56.26(9).

> " 'Prevailing wage' means the wage rate paid by virtue of collective bargaining agreements by employers employing a majority of workmen of that craft or trade subject to said collective bargaining agreements, in the locality in which the public work is done."

N.J.S. 34:11-56.30.

> "The commissioner shall determine the prevailing wage rate and forthwith shall establish the prevailing wage in the locality in which the public work is to be performed for each craft or trade classification of all workmen needed to perform public work contracts. The prevailing wage shall be determined and computed in accordance with rules and regulations issued by the commissioner as may be required to carry out the provisions of this act; provided, however, that employer contributions for employee benefits pursuant to a then existing bona fide collective bargaining agreement shall be considered an integral part of the trade in the locality under consideration for the purpose of determining the prevailing wage under this act. Said wage determination shall be conclusive for a period of 2 years from date of issuance unless superseded within said 2-year period by a later determination. The commissioner shall forthwith announce all said determinations and give notice by

mail of all determinations of prevailing wage rates made pursuant to this section to any representative of any craft or trade, any employer, or any representative of any group of employers who shall in writing request the commissioner so to do."

N.J.S. 34:11-56.34(b).

"Any workman may within 2 years from the date of the occurrence of the incident complained of file a protest in writing with the commissioner objecting to the amount of wages paid for service performed by him on a public work as being less than the prevailing wages for such services."

N.J.S. 34:11-56.40.

"If any workman is paid by an employer less than the prevailing wage to which such workman is entitled under the provisions of this act such workman may recover in a civil action the full amount of such prevailing wage less any amount actually paid to him or her by the employer together with costs and such reasonable attorney's fees as may be allowed by the court, and any agreement between such workman and the employer to work for less than such prevailing wage shall be no defense to the action. Any workman shall be entitled to maintain such action for and on behalf of himself or other workmen similarly situated, and such workman and workmen may designate an agent or representative to maintain such action for and on behalf of all workmen similarly situated. At the request of any workman paid less than the prevailing wage to which such workman was entitled under the provisions of this act the commissioner may take an assignment of the wage claim in trust for the assigning workman and may bring any legal action necessary to collect the claim, and the employer shall be required to pay the costs and such reasonable attorney's fees as may be allowed by the court."

STATEMENT OF THE CASE

The issues involved before this court are strictly constitutional. Petitioner became a party to a contract entitled "Royce's Brook Interceptor Sewer Contract #1". On January 26, 1974 the Commissioner of the Department of Labor and Industry of New Jersey (hereinafter designated Commissioner) instituted an action in Chancery Division of the Superior court alleging that Petitioner failed to pay "the prevailing wage" to workmen on a public works project, in violation of N.J.S. 34:11-56.25 et seq.

The trial court found that the statute as applied designated the county as the "Locality" as defined in the statute and that the Commissioner in this case determined the "prevailing wage" as defined in the statute, exclusively by the Collective Bargaining Agreement involving only one union and one employer and that as applied to the Petitioner, the statute was unconstitutional.

The Appellate Division reversed the trial court and the Supreme Court of New Jersey affirmed the Appellate Division.

REASONS FOR GRANTING THE WRIT

The Petitioner is challenging a State Statute which granted one union and one employer the absolute power to fix the wage rate to be paid by Petitioner to his employees for public projects in the "Locality" wherein the Petitioner was a contractor.

The New Jersey Supreme Court frankly admitted that the statute, N.J.S. 34:11-56.25 et seq., "is not a true prevailing wage statute since non-union wages are not used in determining the wage rate" (A - 3). However, the court upheld the statute. Petitioner's rights under both the due process clauses of the State and Federal Constitution were raised below (Brief of Township of Hillsborough to the New Jersey Supreme Court page 4, which was adopted by Petitioner).

The issue involved is whether private groups can be granted the power, by statute, to control the economic affairs of third persons without standards, safeguards, notice, hearing or review. The issue is of vital concern as it touches upon the most fundamental issues of both substantive and procedural due process. It further draws into question the extent to which unions and employers who are parties to collective bargaining agreements, can restrict the freedom of contract and the right to competition

of third persons and wiether the public interest is not in fact adversely effected where a statute attempts to artifically fix wages based upon union rates rather than the marketplace at a time when our nation is in the midst of a recession.

Furthermore, at issue is whether United States Supreme Court decisions which invalidated similar statutes in the recent past, which decisions have not been overruled, are in fact, still the law of our nation.

LEGAL ARGUMENT

N.J.S. 34: 11-56.25 VIOLATES THE DUE PROCESS CLAUSE OF THE 14TH AMENDMENT

A. THE DELEGATION OF POWER TO FIX WAGES TO PRIVATE GROUPS WAS UNCONSTITUTIONAL.

Carter v. Carter Coal Co., 298 U.S. 238, 310, 311 (1935) involved the validity of statute which empowered certain mine producers and unions to fix wages and hours. In striking down that power the court said:

> "That subdivision delegates the power to fix maximum hours of labor to a part of the producers and the miners—namely, 'the producers of more than two-thirds of the annual national tonnage production for the preceding calendar year' and 'more than one-half of the mine workers employed'; and to producers of more than two-thirds of the district annual tonnage during the preceding calendar year and a majority of the miners, there is delegated the power to fix minimum wages for the district or group of districts. The effect in respect of wages and hours, is to subject the dissentient minority, either of producers or miners or both, to the will of the stated majority, since, by refusing to submit, the minority at once incurs the hazard of enforcement of the drastic compulsory provisions of the act to which we have referred. To 'accept' in these circumstances, is not to exercise a choice, but to surrender to force.
>
> *The power conferred upon the majority is, in effect, the power to regulate the affairs of an unwilling minority. This is legislative delegation in its most obnoxious form; for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons* whose interests may be and often are adverse to the interests of others in the same business. The record shows that the conditions of

competition differ among the various localities. In some, coal dealers compete among themselves. In other localities, they also compete with the mechanical production of electrical energy and of natural gas. Some coal producers favor the code; others oppose it: and the record clearly indicates that this diversity of view arises from their conflicting and even antagonistic interests. The difference between producing coal and regulating its production is, of course, fundamental. The former is a private activity; the latter is necessarily a governmental function, since, in the very nature of things, one person may not be entrusted with the power to regulate the business of another, and especially of a competitor. And a statute which attempts to confer such power undertakes an intolerable and unconstitutional interference with personal liberty and private property. The delegation is so clearly arbitrary, and so clearly a denial of rights safeguarded by the due process clause of the Fifth Amendment, that it is unnecessary to do more than refer to decisions of this court which foreclose the question. *Schechter Corp. v. United States*" emphasis added

Washington Ex rel Seattle Title Trust v. Roberge 278 U.S. 116, 122, 123 (1928) involved the constitutionality of a zoning ordinance which conditioned certain uses for real property upon the consent of adjoining landowners. The zoning ordinance was declared unconstitutional. The court said:

"There is no provision for review under the ordinance; their failure to give consent is final. They are not bound by an official duty, but are free to withhold consent for selfish reasons or arbitrarily and may subject the trustee to their will or caprice. *Yick Wo v. Hopkins*, 118 U.S. 356, 366, 368. The delegation of power so attempted is repugnant to the due process clause of the Fourteenth Amendment. *Eubank v. Richmond*, 226 U.S. 137, 143. *Browing v. Hooper*, 269 U.S. 396."

Bradley v. Casey 114 N.E. 2nd 681, 685 (Supreme Court of Illinois 1953) is a case involving a statute very similar to the statute Petitioner complains of. The Illinois statute was also a "prevailing wage" statute wherein the wages contractors were required to pay was not the real prevailing rate but rather was the rate set by collective bargaining agreements. The Court said:

> "We believe, however, that there is merit in petitioner's contention that the 1951 amendment to section 2, defining wages under a collective bargaining agreement as the prevailing rate of wages in a given locality, is invalid for the reason that it delegates a discretionary power to private parties and that it tends to be too restrictive and discriminatory in defining that to be fact which is not a fact. Upon close analysis it can be seen that this amendment permits the *fixing* of the standard rather than *finding* or *ascertaining* an existing fact. This amendment then, being vulnerable to the foregoing criticism, is clearly unconstitutional." p. 685.

Also cited for similar propositions are *Schechter v. United States*, 295 U.S. 495, 537 (1935); *Fink v. Cole*, 97 N.E. 2nd 873 (Court of Appeals of New York 1951); *Public Authority To Private Groups*, 67 Harvard L. Rev. 1398 (1954).

B. N.J.S. 34:11-56.25 ET SEQ. IS ARBITRARY AND CAPRICIOUS AND WITHOUT ANY STANDARDS FOR FIXING WAGES.

The criteria for measuring whether a statute or ordinance is valid is well stated in *People v. Leadbitter*, 85 N.Y.S. 2d, 287 (Supreme Court 1948)

> "The general standard which revolves from a consideration of many cases on the subject of police power is that a law or ordinance which limits constitutionally guaranteed rights must not be arbitrary, discriminatory, capricious or unreasonable and must bear a real and substantial relation to the object sought to be obtained, namely the health safety, morals or

general welfare of the public. The constitutional rights of a citizen may never be curtailed by an unreasonable regulation passed by virtue of police power. A legislative body may not, under the guise of protecting the public interest, interfere with private rights by imposing arbitrary or unreasonable restrictions upon a lawful business. *City of Cincinnati v. Correl*, 141 Ohio St. 535, 49 N.E. 2d 412. The Federal and State Constitutions do not prohibit governmental regulation for the public welfare. They merely condition the assertion of the admitted power, by securing that the end shall be accomplished by methods consistent with due process. The guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary, or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained. *Nebbia v. People of State of New York*, 291 U.S. 502, 54 S. Ct. 505, 78 L.Ed. 940, 89 A.L.R. 1469. The reasonableness of each regulation depends upon the relevant facts. The law must be reasonable in its application, and must be passed to prevent some manifest evil. *Fisher Co. v. Woods*, 187 N.Y. 90, 79 N.E. 836, 12 L.R.A., N.S. 707. If the law violates these accepted principles, it constitutes an invasion of the constitutional rights of the individual."

A statute is scrutinized especially carefully if it is in derogation of the constitutional right against impairment of contract (Article I Section 10 of the United States Constitution). See *Poley v. Bank of America*, 324 P.2d 35 (District Court of Appeal 1958).

Also cited for similar propositions are *Nebbia v. People of State of New York*, 271 U.S. 502 and *Carter v. Carter Coal Co., supra; Schechter vs. United States, supra.*

It is striking that N.J.S. 34:11-56.25 et seq. does not provide *any* standards to control the delegation of power to fix wages, although such standards are required of statutes to prevent the party to whom the power is delegated from acting as if it where a legislature in itself. See *Panama Refining Co. vs. Ryan*, 293 U.S. 388 (1934).

While the statute has *no* standards to guide or control the union and employer in fixing the prevailing rate, the union and employer are not motivated by the public interest in fixing the prevailing rate, but rather are guided by their self-interest. Furthermore, while the union and employer theoretically have diverged interests, in fact, they often do agree to higher wages when they can pass them onto the public. The prevailing wage statute makes it easier for the union and employer to excessively boost wages and to protect such wage increases from stabilizing influence of competition. In this era of rising inflation, N.J.S. 34:11-56.25 et seq. is in violation of the public interest as well.

C. N.J.S. 34: 11-56.25 ET SEQ. VIOLATES ALL CONCEPTS OF PROCEDURAL DUE PROCESS.

It is basic constitutional law that before a contractual right or property of a party is entitled to notice and a fair hearing and a right of review. *Seattle Trust Company v. Reberge, supra; Fuentes v. Shevin*, 407 U.S. 67, 80 (1972); *Snaidbach v. Family Finance*, 395 U.S. 337 (1969); *Bell v. Burson*, 402 U.S. 535 (1971); *Goldberg v. Kelly*, 397 U.S. 261 (1970).

The statute, contrary to constitutional requirements, provides no right to notice, no right to a hearing and no right to review the uncontrolled discretion of the union and employer.

CONCLUSION

For the reasons expressed herein, we respectfully submit that this Court should grant certiorari in this case.

Respectfully submitted,

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MR. SHERIDAN: I think it is less than that.

MR. DeMARCO: Almost $3300.00

THE COURT: Reference to the first Pretrial Order of July 27, 1970 will show that the claim was $4,288.64. Before we got finished with the audit, it brought it up to $60,735.45. A subsequent Pre-trial Order, amendatory in nature, was entered. And at this trial, the claim was for a deficit of $57,685.16. I refer to and incorporate in these findings, as though I had read them at length, the colloquy among counsel and the Court with respect to the difference between this $57,685.16 as a reasonable explanation. In any event, I accept the figures in the audit P-9 as factually correct.

Now, that, in essence, is all the findings with regard to the mechanics of the bid. I turn to the manner in which the prevailing wage was determined in this case because this is the pivotal issue. I have no doubt at all, and I cannot over-emphasize this fact, that the manner of the determination of the prevailing wage in this case is the burning question, to coin a phrase. If the prevailing wage, under the circumstances of this case, was constitutionally determined, is not subject to constitutional attack, I have no doubt at all that the Prevailing Wage Act applied, and that the plaintiff must prevail, and I will have to turn then to the other questions. There are other questions such as assignment and indemnification which I will get to. If, on the other hand, there is a constitutional deficiency, then the plaintiff's case must fail and I have no real need to determine the other issues.

It is to be noted in this case that there are two separate schedules involved really. There are those who were in job classifications which might well have been covered by the collective bargaining of the International Union of Operating Engineers, and there are those whose job classifications might have been covered by the Heavy and General Laborers. For all intents and purposes, as again appears from the stipulation which I incorporate by reference as though I had repeated it herein, that while these are two distinct claims here, as it were, they go to two

mutually exclusive types of employment involved, the issues relating to each are the same. So, that if I treat of one, the treatment is equally applicable to the other, and that is precisely what I propose to do, just in order to expedite the findings. I will treat it as though it were just the one. It applies to both. In each case, incidentally, the union involved, whether it be the Operating Engineers or the Heavy and General Laborers, is the only union in New Jersey with jurisdiction over the classification of workers involved in that union and in the contracts here. This is a salient point because we have in this case a situation where the collective bargaining contract results solely from the negotiations between one employers' organization, the Associated General Contractors, and one union, one employees' organization. I think this, too, is vitally important.

Now, I will turn to the findings or the manner in which the prevailing wage is determined ostensibly by the Commissioner, pursuant to his interpretation of his obligation under the statute, and I can do this very simply because there is no doubt in my mind there is not a word of testimony to the contrary, and, as a matter of fact Counsel for the State readily agrees that this promulgation of the schedule was a pure and simple acceptance of the collective bargaining contract as the employers' organization and the employees' organization determined it to be. The Commissioner, through his agents, and by way of stipulation of his Counsel, as a matter of fact, eschewed completely any discretionary power. That there can be any doubt about the validity of this finding is to be seen from such telling evidence as P-5, a letter addressed by the Commissioner to Peter Weber, President of the Operating Engineers, suggesting that if he has any corrections or amendments in the promulgation to make, he make them so the schedule can be promulgated. And the testimony appeared, as a matter of fact, and I think I am quoting, gentlemen, almost precisely. There may be one or two words wrong. I intend to refer to the portion of the record that contains this statement in the testimony of Mr. Hall, an agent of the Commissioner, "In previous years, even if so much as a comma was missing, they would tell us about it and we would have to correct it and send it back to them again." When he said "we," he meant the Department of Labor & Industry, the Commissioner, and when he said "they," he meant the union, the International Union of Operating Engineers. So there is no question in my

mind at all that the promulgation itself was the joint effort of the employers' organization and the employees' organization.

Now, Mr. Sheridan argues, not unreasonably, but in my judgment not persuasively, that this is still a promulgation of the Legislature because they say in the statute that this is the way it is to be done. I make that point because I don't want the record to indicate that I missed the argument, Mr. Sheridan. I understand it. I disagree with it. I considered as well, and I find as a fact the testimony whereby the Commissioner completely eschewed any discretion, reported, through his agents, in testimony, that he did not consider non-union wages because the statute didn't permit him to do that, but I add, not even as a matter of exercise of discretion to test the reasonableness of any "promulgation" by these organizations, nor did he consider geographical differences, for instance.

Finally, it is to be observed that on my inquiry of Mr. Higgins, an agent of the Commissioner, as to whether any different course would be pursued, should a collective bargaining wage rate appear for promulgation that was so far out of line it suggested hanky-panky, again to coin a phrase, the answer was in the negative; that the Commissioner feels himslef compelled to accept as the prevailing wage that which the Associated General Contractors and the International Union of Operating Engineers agree it should be. In my judgment, this is not a legislative promulgation, nor is it the promulgation of a properly delegated legislative agent. This alone would be fatal from a constitutional standpoint.

Now, I have no doubt — I have said this before. I just want to make sure it is in. I have no doubt that in general terms the Prevailing Wage Act is a legitimate exercise of a proper power of the Legislature to regulate in order to implement the public policy expressed in N.J.S.A. 34:11-56-25 put another way, that effectuation of the public policy there declared is a proper legislative objective. I have no doubt about that. And I believe as well that the Prevailing Wage Act, by its terms, seeks to accomplish that objective. Please note that I am speaking now in terms of generalities. I would add to these generalities that to the extent delegation of the legislative function to the Commissioner appears in the Prevailing Wage Act, as I construe it to be, the standards which accompany that delegation are sufficient to protect it against constitutional attack on the due process basis.

I conclude therefrom that to the extent this action might be deemed to attack the Prevailing Wage Act, which it does not do at all, as we have said, the defendants would not have borne their burden in any event of overcoming that which I acknowledge to be a presumption of validity which accompanies legislative action. To the contrary, as I have said, in my judgment the act is

Oh, incidentally, while I am disposing of generalities, let me add this: some mention has been made of the failure of the Commissioner to promulgate rules and regulations, as he is permitted to do in N.J.S.A. 35:11-56.30, he has not promulgated written rules and regulations. I make that finding. This failure does not, in my opinion, in and of itself defeat the legislative purpose and the effectuation thereof by the Commissioner, at least in this case. There is nothing to indicate that the defendants here have suffered anything by virtue of the want of published written rules and regulations. Were the attack on the promulgation of the Prevailing Wage Act to arrive here either by virtue of non-cooperation of an entity whose cooperation was necessary to establish the act, or by way of resistance to the establishment of the prevailing wage because one upon whom it was imposed did not know and had no way to know the manner in which it was determined, the result might be different. But that isn't the situation here. And I believe that this action is not an appropriate one in which to determine whether Section 56.30 (a) permits or (b) requires rules and regulations. To the extent that a defense predicated upon the absence of rules and regulations is offered, I reject it.

Accordingly, I turn to the real question here. Again, I apologize for the fact that this is inarticulately stated, but that question really is: Where the Commissioner is properly empowered to determine a prevailing wage in an industry limited, as here, to one employing group and one group representing employees, and he announces a determination as actually made by those limited groups, rather than by him, eschewing any discretion, is the prevailing wage thus announced constitutionally infirm by reason of its resulting from an illegal delegation of legislative power? I think, as I say, that is somewhat inarticulately stated because it starts on the premise that the delegation is legal and ends up with a question about whether it is legal or not. But actually that is the question we have. The statute is a fine statute, but the way the Commissioner has applied it

under the circumstances of this case in my view does present a constitutional problem. The question which I pose, in my view, should be answered in the affirmative. Such activity is constitutionally infirm. Accordingly, I reach none of the other questions presented, although I am going to comment on them in a minute, and my determination is confined to the narrow limits of the question as expressed above.

Now, as I have said, I have no doubt at all that the Legislature might well and properly safeguard—And, gentlemen, I employ an old lawyer's trick, resort to the language, the precise language of the statute. I have no doubt that the Legislature might well safeguard the efficiency and general well-being of workmen and protect them and their employers from the effects of serious and unfair competition resulting from wage levels detrimental to efficiency and well-being and establishing, under the police power, a prevailing wage below which public works shall not be contracted. I have no difficulty at all with the concept of this as a proper and reasonable legislative objective. And I have no doubt that sanctions to insure enforcement of such a statute may be provided. Nor do I have any doubt that this function may be delegated by the Legislature with appropriate standards to the Commissioner of Labor & Industry. I might say that the days of the Schecter Poultry case have long since passed, and that the necessity for flexibility in the various arms of government was emphasized in a case with which I had retrospectively bitter personal concern, Esso Standard Oil against Holderman. The defense mechanisms of my mind have caused me to forget the citation. The reasonable and proper objective of such legislation, primarily the Legislature's and properly delegated to the Commissioner, is to establish a formula, i.e., a standard, in order that the prevailing wage may be ascertained. This the Legislature has done quite properly, it seems to me, in N.J.S.A. 34:11-56.26(9). In simple language, the Legislature directs the Commissioner to take a look at the collective bargaining agreements entered into by employers employing the majority of workmen in a particular craft or trade in any locality — and N.J.S.A. 34:11-56.26(2) tells us that locality means any political subdivision of a state or a combination of those political subdivisions, which seems to me to permit the inclusion of the entire state — and to ascertain from that look what the prevailing wage is. He is then to promulgate that as a minimum in the case of public works

contracts above $2,000.00 and in municipalities of more than 25,000, or [illegible] the case of legislatively established authority. Defendants argue that the use of the plural in subsection 9 in terms of agreements by employers portends a clear legislative intent that more than one employing authority and more than one labor organization is necessary. Now, despite the conclusion which I have reached and which I have already announced, I want to say specifically I don't reach that question here. I am only concerned with the circumstances of this particular case. It may be on a proper showing that less than two organizations could be properly delegated, if they meet that which I will refer to presently as due process standards, just for the sake of a definition. I don't reach that question because I am convinced that under the circumstances of our case, unless a broader spectrum than one employer and one employee organization is involved, constitutional considerations closely akin to those invoked in *(Group Health Insurance of New Jersey vs. Howell,)* 40 N.J. 436, come into play. I suppose what I am saying is this, if the Legislature intended less than that broad spectrum, or intended to permit what was here done, that portion of the Act expressing such an intent or activity construing it thus to be expressed is unconstitutional or, disjunctively, if the Commissioner believes the Act to say that, his interpretation of the Act is constitutionally inform.

Now, I acknowledge a clear distinction with the Howell case—If I speak of just the Howell case, I am speaking of 40 N.J. to distinguish it from the succeeding case in 43 N.J. In Howell, the legislative discretion was delegated, in effect, at least to the Medical Society without whose approval no nominee for trustee of a medical service corporation could serve. In this respect, plaintiff in our case points out the distinction between that one entity and the fact that we have in our case two normally antagonistic groups, and relying on the distinction between the single, apparently harmonious entity capable of preventing a trusteeship by its vote in Howell, and the antagonism here in establishing between employer and employee a wage satisfactory to both. The plaintiff continues by saying where this disharmony and general disparity of position occurs, the distinction with Howell is sufficient to prevent the invocation of the Howell doctrine.

The factual distinction is true, and to the extent that the

Medical Society is one ostensibly harmonious society, and we have here two groups that are normally antagonistic one to another with respect at least to wages, it being presumed that employers want to keep the wages ease the potential for harm is sufficiently significant that the Constitution does not permit the risk. I would add that with respect to the other employers and other agreements, the risk is only avoided by virtue of the circumstances of multi-body accord in the preparation, the usual situation in connection with prevailing wages, the reduction of the potential by an increase in participating numbers. In this respect, compare the Independent Electricians and Electrical Contractors Association of the State of New Jersey against New Jersey Board of Examiners of Electrical Contractors, 34 N.J. 466, at page 483 where a precise, reasonable, intelligent and cogent analysis and definition have been offered by Justice hall, to wit:

"The testimony here shows that the National Electrical Code is the standard accepted safety code in the electrical industry throughout the United States and indeed forms the basis for those municipal electrical codes existing in New Jersey. The Code is promulgated by the National Fire Protection Association and the American Standard Association through 17 panels of recognized electrical and safety experts throughout the country, who review and revise it every three years. The procedures of adoption, review and revision reflect a national consensus of manufacturers, consumers, scientific, technical and professional organizations, and governmental agencies. While the product bears no formal governmental aegis, the manner of its adoption and revision and the universality of its acceptance indicates to us that it should be accorded the same standing for present purposes as if it were adopted and revised by some non-New Jersey governmental agency within the rationale of Hotel Bar Foods, 18 N.J. 113 (1955). We therefore conclude that there was no unconstitutional delegation of legislative power in the statutory subdivision involved."

Were standards of such universality of acceptance apparent here or standards of participation in the promulgation by such a broad spectrum, I would have far less doubt and indeed not vitiating doubt in the result. But we have here two groups. No more. This potential for harm in our case is magnified I think as pointed out in Howell where these two groups of participating bodies are "not subject to public accountability" as here.

Finally, in view of the Commissioner's complete disavowal of any residuary discretion, which is the manner in which he interprets the statute and acts accordingly, I believe that the public is not sufficiently protected against arbitrary or self-motivated action on the part, as it was put in Howell, of such private body to whom the legislative function has really been delegated.

This really is a return to the question of reasonableness of the aim of the statute. The conclusion I inject here is somewhat intellectual rather than pragmatic. But the reasonableness of the legislative aim, it seems to me, must necessarily decline in direct proportion to the extent to which the potential for harm to the public increases.

Now, it may well be, and I acknowledge that the potential for public disservice will never be realized, that the self-interest of the employers and the employees in achieving their own objectives will remove from their minds any thought of collective action to benefit each at the expense of the taxpayers. But the risk exists in my judgment to such a proportion that the due process clause of the Constitution may be invoked as a shield against it. Who is to say that the employers and employees might not at some time under the aegis of their conditions at the expense of the taxpayers, knowing that their word becomes law with regard to the wages which must be paid at least on public works? In this day of ever increasing quantity of municipal, county and state participation in the gross national product, the possibility increases in direct proportion.

One other detriment occurs to me which I use — I was going to say I use a bootstrap, but that is not so. It is a very real thing. The potential for harm here is magnified in its import by the complete unavailability of review. Where you have an actual determination by an administrative body working under a delegation of legislative function, you have without exception, to my knowledge, a manner in which the reason for that determination can be examined and tested and challenged. If we are to accept, as here, the promulgation by these two organizations, then we must forego the right to review because there is no manner in which a hearing can be held to determine how the Associated General Contractors and the Operating Engineers arrived at this figure. You can ask the Commissioner, but all he is going to say, "I got it from these two groups." The rationale applied by the employers' organization and the employees' organization cannot be

examined to determine the reasonableness of its determination or, as a matter of fact, the relationship of that determination to the proper statutory purposes to be served.

Now, I am going to add — and I mention this briefly at the outset just so nobody will come to the conclusion that I have ignored it or passed it by — I recognize maybe a pausity of proofs in certain directions here. For instance, it is conceivable that the State could come in and show that these two groups historically, and by virtue of their membership and their representation and this and that and other factors are such that the potential for harm could never, under any circumstances, be realized. And it is conceivable on the other hand that the defendants could have shown up with something to prove just to the converse. Ordinarily, under those circumstances where the proofs were insufficient in this regard, the presumption of validity might prevail. I don't think so in this case. To me it is so apparent that this is bad that I can't conceive of any proofs by the state which would bolster it to the extent of being good. In other words, this isn't the Independent Electrical Association case. This is still two organizations in New Jersey.

Now, this disposes of the entire matter. I could quit right now and I would be done. But in order to expedite any other determination, perhaps at the Appellate level in the event my judgment proves to be unsound, let me make some other findings.

Now, I want to make it perfectly clear — Now, this is selfish. Some things may be altruistic. This is selfish. My proceeding to these other findings indicates no lack of confidence whatsoever in that which I have said. I didn't have much trouble with the determination which I have just made. I will tell you frankly at the outset, intuitively I felt it was wrong. Then I read the statute and I said what Mr. Sheridan later said to me, "Well, how else do you do it?" I said, "Maybe it is not that wrong." But that question, "How else do you do it," is not for me to decide. That is for the Legislature. When I get into that, I am transgressing my function. My function is to look at what they have done and decide whether in my judgment it is right or wrong. That is all I have done. And I am satisfied, completely satisfied that it is bad.

Having said that, let me go to the no assignments defense under N.J.S.A. 34:11-56.40. I have already made the finding that there were no assignments from any of the workmen. There appears, and I incorporate by reference, certain comments in the

record of mine at the time an objection is made or a motion in this respect, at which time I pointed out the conflicting public policy considerations that then occurred to me. As I say, I reiterate that and repeat it now as though I set it forth at length. On more mature reflection, I am convinced that this failure to secure assignments should be fatal to a cause of action in this case. The public is protected for the purposes of the statute by virtue of N.J.S.A. 34:11-56.35 which is a penalty provision, and, as a matter of fact, was invoked in this case, in this very case. So that I see no reason why the state should be excused in its quest for compliance with the statutes from its own compliance with the state which provides for a recovery only in cases or which provides, as a mechanic toward recovery, an assignment of the workmen.

Now, here again, as I said somewhat facetiously, but not totally, with counsel at the time of argument, I could buttress this by saying the statute is in derogation of the common law and accordingly should be strictly construed. In my judgment that makes it directory — mandatory rather than advisory. I am sure if I looked hard enough I could find something else that said when a public policy is involved it should be advisory and not mandatory. I just have the feeling that the act is for the benefit of the workmen as well as the industry. For that reason, the Legislature in its wisdom, which is not susceptible of my challenge, it is not mine to say whether the Legislature is wise or not, says that an action like this may be commenced upon the workman's bringing it or someone bringing it — his right to delegate someone to bring it on his behalf, or by the state on assignment. I find the assignment necessary, and had I found the statute good, would have denied the cause of action for failure to have gotten the assignment.

As far as the indemnification goes, I still sit in a Court of Chancery, and I have no doubt at all that both defendants should be left precisely where we find them by virtue of their own activity in the premises. I don't like to use the word "unclean hands," although that is the doctrine really under which my comments fall, because unclean hands generally imports doing something dirty. It is the difference between lulling and something else that Mr. DeMarco could mention in his argument, and I don't mean that here. Actually, maybe I am talking more of estoppel than unclean hands. But there is no doubt at all but that the municipality knew or should have known of the application of

the statute to the authority and should have provided the schedule that was in there. We have Mr. Jamison's testimony at page 25 suggests the absolute knowledge of Van Note-Harvey, the consulting engineers, speaking of prevailing wage rates, "We have one for authorities or large municipalities which comes under the prevailing wage rate, but doesn't have federal or state funds involved in it." Right there is a recognition of the distinction between authorities, municipal authorities such as this and any other situation. I have no doubt at all but that the municipality should not be allowed to profit, as it were, by virtue of the failure, knowingly or constructively knowingly, to include in their contract documents the schedule and to take whatever steps were necessary to insure compliance. On the other hand, Mr. Renda — I pause to insure that the words which follow demonstrate a proper judicial temperament and some temperance in what I have got to say, because I have no sympathy at all for Mr. Renda. Mr. Renda, who eschewed any knowledge of these things, and said he left it to his subordinates who were getting paid to do this, also said in depositions at page 10— Well, I will just make reference. It is between lines 21 and 24 he points out that he has two jobs in the same community, one prevailing wage and one not prevailing wage. And after that, I have some difficulty in becoming convinced by Mr. Renda that he didn't know what this was all about or that the potential existed. As a matter of fact, the testimony satisfied me completely that Mr. Renda complied with the Prevailing Wage Act whenever it was furnished to him, and didn't comply whenever it was not furnished to him, whereby his test whether or not the Prevailing Wage Act applied was whether the schedule was provided or not, and that he did this with knowledge of the fact that this is not what determines responsibility. In other words, he put the burden on someone else of making the statute applicable. And, of course, this is just not so. The burden is his. I am satisfied that whether you call it estoppel or unclean hands in this Court of Chancery as between the defendants, I should leave them where I find them.

Now, what I have said has also disposed of everything I have reserved. I had, as I recall, only two things. One was the assignments question and the other were the motions at the end of the plaintiff's case. I have taken care of those.

One final word. I would deplore that Mr. Renda thought this

was a vindication. In dark days and difficult cases there is some satisfaction to be found in the fact, of which this particular Pollyanna is certain, that not all people take Mr. Renda's approach to the law. If they did, we would be so busy in all our mandatory law enforcement that there would be no time for anything else. Fortunately, most citizens make a conscientious effort to comply with the law rather than looking for ways to avoid the rules designed to buttress the precious rights of all of us. Mr. Renda is not vindicated. Rather he is given another reason to search out and obey the laws which protect us all, and without which Mr. Renda would have in almost $60,000.00 worth of trouble here. I have taken pains to make that statement as dictum in the devout hope that it will be brought to his attention.

An appropriate Order may be submitted, gentlemen. I think probably you should prepare it, Mr. DeMarco. And I would like to have it, if I may, by the end of next week. I might suggest that the simple way to do it is, having made oral findings and conclusions which are incorporated herein, you know, just by way of reference to them, it is ordered that the complaint be dismissed.

I forgot to add one thing. No costs to any party.

I will return the exhibits, gentlemen. MR. DeMARCO: Thank you, Judge. (Hearing closed.)

* * * * * *

I, DONALD J. MOORE, Official Court Reporter of the State of New Jersey, do hereby certify the foregoing to be a true and accurate transcription of my original stenographic notes taken at the time and place hereinbefore set forth.

DONALD J. MOORE, CSR
OFFICIAL COURT REPORTER
Date: September 9, 1971

APPENDIX B

Opinion of the Superior Court of New Jersey, Appellate Division

(Filed—February 21, 1973)

Argued October 17, 1972—Decided Feb 21 73

Before Judges LABRECQUE, KOLOVSKY and MATTHEWS

On appeal from the Superior Court, Chancery Division, Somerset County.

Ms. Virginia Long Annich, Deputy Attorney General, argued the cause for appellant (*Mr. John P. Sheridan, Jr.,* Deputy Attorney General, on the brief; *Mr. George F. Kugler,* Attorney General of New Jersey, attorney).

Mr. Raymond P. DeMarco argued the cause for defendant-respondent Ernest Renda Contracting Co., Inc. (*Messrs. Romer & DeMarco,* attorneys).

Mr. William P. Westling argued the cause for defendant-respondent, cross-appellant Township of Hillsborough Municipal Utilities Authority (*Messrs. Imbriani and Westling,* attorneys).

Mr. Thomas L. Parsonnet filed a brief on behalf of *amicus curiae* New Jersey State A.F.L.-C.I.O. (*Messrs. Parsonnet, Parsonnet and Duggan,* attorneys).

Mr. Anthony C. Mcola filed a brief on behalf of *amicus curiae* New Jersey Building and Construction Trades Council, A.F.L.-C.I.O. (*Messrs. Dunn and Pykon,* attorneys).

Mr. Ronald L. Tobia filed a brief on behalf of *amicus curiae* Associated Independent Contractors.

Opinion of the Superior Court of New Jersey, Appellate Division

Mr. Richard K. Rosenberg filed a brief on behalf *amicus curiae* Utility Contractors Association of New Jersey, Inc. (*Mr. Herbert R. Ezor* on the brief; *Messrs. Heller and Laiks,* attorneys).

The opinion of the court was delivered by

MATTHEWS, J.A.D.

The Commissioner of Labor and Industry (Commissioner) instituted this action under N.J.S.A. 34:11-56.25 et seq., the Prevailing Wage Act (Act), in the interest of employees of defendant Ernest Renda Contracting Co., Inc. (Renda), who performed work on a public works project contracted for by defendant Municipal Utilities Authority of the Township of Hillsborough, Somerset County (Authority).

The complaint alleged that defendants failed to pay the prevailing wage to employees of Renda on the aforementioned public works project and otherwise failed to fulfill the obligations under the Act. The Commissioner sought judgment requiring defendants to pay to him as trustee for the workman involved, the difference between the amount actually paid to those workmen and the amount that should have been paid in compliance with the Act. That amount was originally computed after preliminary audit at $3,288.64. Later, in August 1970, after the commencement of this action, the Commissioner caused an additional audit to be conducted which covered the entire period of the project which by then had been completed. The additional audit disclosed that the difference between the amount Renda's employees had actually been paid and the amount due under the prevailing wage schedule to be $57,685.16.

N.J.S.A. 34:11-56.25 et seq. was adopted in 1963. (L. 1963, c. 150). Section one of the Act (N.J.S.A. 34:11-56.25) provides:

> It is declared to be the public policy of this State to establish a prevailing wage level for workmen engaged in public works in order to safeguard their efficiency and general well being and to protect them as well as their employers from the effects of serious and unfair competition resulting from wage levels detrimental to efficiency and well-being.

Under section two (N.J.S.A. 34:11-56.26) certain sums as used in the Act are defined. These include subsection (4), "public body":

> (4) "Public body" means the State of New Jersey, any of its political subdivisions, except municipalities having a population of less than 25,000, any authority created by the Legislature of the State of New Jersey and any instrumentality or agency of the State of New Jersey or of any of its political subdivisions.

and subsection (9), "prevailing wage":

> (9) "Prevailing wage" means the wage rate paid by virtue of collective bargaining agreements by employers employing a majority of workmen of that craft or trade subject to said collective bargaining agreements, in the locality in which the public work is done.

Under section three (N.J.S.A. 34:11-56.27) it is stated that the Act applies to every contract in excess of $2,000 for any public work and that every contract covering such

work must contain a provision setting forth the prevailing wage to be paid as the same has been established by the Commissioner.

Section six of the Act (N.J.S.A. 34:56.30) sets forth the method in which the Commissioner is to establish the prevailing wage rate in any locality. "Locality" is defined in N.J.S.A. 34:11-56.26(2) as follows:

> (2) "Locality" means any political subdivision of the State, combination of the same or parts thereof, or any geographical area or areas classified, designated and fixed by the Commissioner from time to time, provided that in determining the "locality" the commissioner shall be guided by the boundary lines of political subdivisions or parts thereof, or by a consideration of the areas with respect to which it has been the practice of employers of particular crafts or trades to engage in collective bargaining with the representatives of workmen in such craft or trade.

The testimony adduced below disclosed that the Commissioner did not adopt any rules or regulations to implement the Act because he concluded that it was sufficiently specific. A procedure was established, however, to facilitate ascertainment of the prevailing wage. First, the county was chosen as the "locality" within which to determine the prevailing wage pursuant to N.J.S.A. 34:11-56-26(2) because he determined that political unit to be the most proper subdivision for practical determination of the prevailing wage. Second, the number of collective bargaining agreements covering a particular type of work within each county are ascertained. Third, if there exists more than one collective bargaining agreement covering a particular type of work, he determines which agreement

covers the majority of workers for a particular craft or trade. Fourth, the wage rate set forth in that collective bargaining agreement becomes the prevailing wage rate for that craft or trade in the county concerned. Fifth, the prevailing wage rate is promulgated and filed in the office of the Secretary of State. It was explained at the trial that the Commissioner, to insure the accuracy of prevailing wage rate schedules, usually checked the collective bargaining contract rates against a building contractor's manual which is published monthly and, also, against bulletins received from the Associated General Contractors. It was noted that it has been the experience of the department that any mistakes in a schedule are quickly brought to the Commissioner's attention by contractors.

In May and July of 1968, the Commissioner promulgated prevailing wage rate schedules for Somerset County for types of work which may be, for our purposes, classified as heavy and general construction, and operating engineers work. Before these schedules were promulgated, the Commissioner contacted the International Union of Operating Engineers, Local 825, and the Heavy and General Construction Workers, Local 472, and requested that he be provided with the contract of each with the Associated General Contractors. Only these unions were contacted because they were the only unions which were parties to collective bargaining agreements covering the aforementioned types of work within Somerset County. Thereafter, the pertinent prevailing wage schedules were prepared from those contracts and promulgated, as above described.

During the latter part of September 1968, the Commissioner was informed of the public works contract between defendants. The contract, on which work had commenced on September 1, 1968, provided for the construction of the

Royce's Brook Interceptor Project at a cost of $624,775.40. Knowledge of this contract was gained through the Dodge Reports. A check of the commission records disclosed that no request had been received from defendant Sewer Authority for a copy of the prevailing wage rate which would be applicable to the contract. The Commission immediately caused an investigation to be conducted to determine whether the parties to the contract were complying with the Act. When it was ascertained that there was a failure of compliance, the Commissioner ordered Renda to commence compliance and to pay up the difference required under the Act. As heretofore indicated, no such payments were made and this action was instituted.

After a three-day trial, the trial judge dismissed the complaint with prejudice and without costs for reasons expressed in an oral opinion. He found that the Act applied to the contract in question. He also found the Act "as a whole" to be constitutional, but he waived the statutory scheme under the facts presented, which disclosed that the collective bargaining contracts here involved were each the product of one union and one employer's group, and as interpreted by the Commissioner, as an unconstitutional delegation of legislative power to private individuals. He expressed concern for what he found to be significant potential for arbitrary, self-interested action inherent in the scheme as interpreted by the Commissioner; that this was improper since the parties to the collective bargaining agreement are not accountable to the public and because their actions are not subject to review. He also concluded that the action should be dismissed for the additional reason that the Commissioner failed to secure wage assignments from the employees on whose behalf the action was instituted. See N.J.S.A. 34:11-56.40. He also noted that had he not dismissed the

complaint both defendants would have been found jointly liable to the Renda employees.

The Commissioner appeals from the dismissal of the complaint and the Authority cross-appeals from the ruling that it would be jointly liable with Renda had the complaint not been dismissed.

I

We do not find that the Act, or the Commissioner's interpretation thereof, presents a problem of delegation of legislative power. As we view the Act, the Commissioner has not been delegated power to perform a legislative function; rather he has merely been granted the power, as a matter of legislative convenience, to determine a set of facts, *i.e.*, the wage rates established under collective bargaining agreements in given circumstances. The Legislature has determined, for reasons set forth in section one of the Act (N.J.S.A. 34:11-56.25), that the wages paid under collective bargaining agreements negotiated between labor unions representing a majority of the workmen engaged in the trade under collective bargaining agreements and their employers shall be the wages paid in the performance of public work. That public policy determination was for the Legislature. We find no constitutional bar thereto. To conclude, as the trial judge did, that under such a scheme "the public is not sufficiently protected against arbitrary or self-motivated action on the part * * *, of such private party to whom the legislative function has really been delegated," misses the point and actually constitutes a substitution of judicial judgment for that of the Legislature. As was noted by the Kentucky Court of Appeals in *Baughn* v. *Gorrell & Riley*, 311 Ky. 537, 224 S. W. 2d 436, 439 (1949), a case involving a somewhat similar statute: "The wisdom of this type of

legislation may be debatable, but that is not a judicial question." See also, *Union School District of Keene* v. *Commissioner of Labor*, 103 N. H. 512, 176 A. 2d 332 (Sup. Ct. 1961).

Moreover, we cannot agree that because of the facts presented here—that the Operating Engineers Local 825, and Heavy Laborers Local 472 are the only unions having jurisdiction over the work and the only unions in these respective trades having collective bargaining agreements covering the "locality"—there is potential for arbitrary, self-interested action which would be detrimental to the public good. It is an every day fact of industrial life that within the labor movement work jurisdiction boundaries in New Jersey have been laid out for the various local unions representing the various trades and crafts. These boundaries may encompass a single county or the entire State. To meet this organization strength, various employers have banded together into trade associations for collective bargaining purposes. We regard it as being highly improbable that these competing groups representing opposing economic interests would conspire together or colloborate to subvert the interest of the public in work performed on public construction. As the Attorney General has noted in his brief, collective bargaining agreements reached between groups such as these represents a balancing of interests, not the interests of a group having a single purpose.

The *amicus curiae* have raised the question as to how statutory procedure established by the Act protects the employer from unfair competition when the employer individually has no part in determining prevailing wages. The answer is relatively simple. The Act was not adopted in the interest of employers. It was adopted to further the interest of the State. As was stated in *Perkins* v. *Lukens Steel Co.*, 310 U.S. 113, 127 (1940):

> Like private individuals and businesses, the Government enjoys the unrestricted power to produce its own supplies, to determine those with whom it will deal, and to fix the terms and conditions upon which it will make needed purchases.

The State need not resort to competitive bidding, and a bidder's rights are subordinate to the primary interests of the State as a consumer. *Trap Rock Industries, Inc.* v. *Kohl,* 59 N. J. 471, 478-481 (1971).

II

An additional reason given by the trial judge for dismissing the complaint was that the failure of the Commissioner to obtain assignments from the employees of Renda barred him from maintaining this action for recovery of the deficiencies in wages. He regarded such assignments to be a condition precedent to the institution of the action under the provisions of N.J.S.A. 34:11-56.40. This section gives each workman who is paid less than the prevailing wage the right to institute a civil action against his employer for such wage deficiency, allowing him to recover, in addition, costs and reasonable attorney's fees. The section also provides:

> At the request of any workman paid less than the prevailing wage to which such workman was entitled under the provisions of this act the commissioner may take an assignment of the wage claim in trust for the assigning workman and may bring any legal action necessary to collect the claim, and the employer shall be required to pay the costs and such reasonable attorney's fees as may be allowed by the court.

The Commissioner, however, did not institute this action under this section. N.J.S.A. 34:11-56.40 is not the only section which empowers the Commissioner to pursue an employer or a workman who fails to comply with the provisions of the Act. Section nine of the Act (N.J.S.A. 34:11-56.33) establishes a procedure which requires a fiscal or financial officer of any public body to withhold sufficient sums for workmen who have been underpaid from payments due to an employer on account of public work performed. Section 12 of the Act (N.J.S.A. 34:11-56.36) gives the Commissioner the power to supervise the payment of amounts due workmen under the Act, and requires the employer to make such payments to the Commissioner to be held in a special trust account for the workmen. Such amounts are to be paid on the order of the Commissioner directly to a workman or workmen. This procedure is established "As an alternative to any other sanctions or *in addition* thereto, herein or otherwise provided by law for violation of this act * * *." As we read this section, it grants the Commissioner the implicit power to institute an action to require an employer to create a trust account as provided therein. The implicit right granted to the Commissioner here does not conflict with the right of action contained in section 16 (N.J.S.A. 34:11-56.40), since the judgment entered against an employer would not be in the name of individual workmen in fixed amounts, but rather would require an employer to comply with the provisions of the section and establish the account directed.

Consequently, we find the action of the trial judge in dismissing the complaint to have been erroneous.

III

The trial judge also concluded in his oral opinion that he had not dismissed the complaint he would have found

both Renda and the Authority liable for the wage deficiencies owed to Renda's employees. That conclusion is challenged by the Authority's cross-appeal.

The trial judge found that the contract between Renda and the Authority contained specifications requiring that the provisions of the Act be complied with. Implicitly, he also found that the Authority did not mislead Renda with respect to the application of the Act to the work in question. We have difficulty in understanding just what theory supports the trial judge's conclusion that the Authority should be held co-responsible with Renda. Absent some contractual provision as the basis for such liability, justification for finding a public body liable for a deficiency owing to employees under the Act must be found in the provisions of the Act itself. A search of the Act discloses that the Legislature has adopted no provision under which a public body may be found liable to a workman. The only duty imposed upon a public body under the Act is found in section four (N.J.S.A. 34:11-56.28), which requires the public body to ascertain the prevailing wage rate in the locality for the work to be performed and to "specify in the contract itself what the prevailing wage rate in the locality is for each craft or trade or classification of all workmen needed to perform the contract during the anticipated term thereof." We find no way that the Act can be read to impose the sanctions or remedies expressly imposed on the employer on the public body.

The record supports the trial judge's finding that Renda knew or ought to have known he should bid his labor costs on the basis of the prevailing wage scale then in force. In addition, that the specifications incorporated in the proposed contract were sufficient to put Renda on notice as to the applicability of the Act as a matter of law.

We find *Male* v. *Pompton Lakes Bor. Mun. Util. Auth.*, 105 N. J. Super. 348 (Chan. Div. 1969) to be factually distinguishable. However, to the extent that it may appear to hold to the contrary to our holding as to the liability of a public body under the Act, it is disapproved.

The judgment of the Chancery Division is reversed and the cause remanded for further proceedings consistent with this opinion. No costs.

APPENDIX C

SUPREME COURT OF NEW JERSEY
A-58/59 September Term 1973

RAYMOND F. MALE, Commissioner,
Department of Labor and Industry,
State of New Jersey,
Plaintiff-Respondent,

v.

ERNEST RENDA CONTRACTING CO., INC.,
a corporation of the State of New
Jersey,

Defendant-Appellant and
Cross-Respondent,

and

HILLSBOROUGH MUNICIPAL UTILITIES
AUTHORITY, Township of Hillsborough,
County of Somerset, State of New
Jersey,

Defendant-Respondent and
Cross-Appellant.

Argues November 21, 1973 — Decided

On appeal from Superior Court, Appellate Division.

Mr. William P. Westling argues the cause for defendant-respondent and cross-appellant Hillsborough Municipal Utilities Authority (*Messrs. Imbriani & Westling*, attorneys).

Mr. Raymond P. Demarco argued the cause for defendant-appellant and cross-respondent Ernest Renda Contracting Co., Inc. (*Messrs. Romer and Demarco*, attorneys).

Mr. Stephen Skillman, First Assistant Attorney General, argued the cause for plaintiff-respondent (*Ms. Virginia Long Innich*, Deputy Assistant Attorney General, on the brief: *Mr. George F. Kugler, Jr.*, Attorney General of New Jersey, attorney).

Messrs. Heller & Laiks filed a brief for *amicus curiae* Utility Contractors Association of New Jersey, Inc.

Mr. Ronald L. Tobia filed a brief for *amicus curiae* Associated Independent Contractors.

Messrs. Parsonnet, Parsonnet & Duggan, filed a brief for *amicus curiae* New Jersey State AFL-CIO.

Messrs. Dunn and Pykon filed a brief for *amicus curiae* New Jersey Building and Construction Trades Council AFL-CIO.

PER CURIAM.

We affirm the judgment of the Appellate Division for substantially the reasons set forth in its opinion reported at 122 *N. J. Super.* 526 (1973), but add the following comments.

The statute in question, *N.J.S.A.* 34.11-56.25, *et seq.*, is not a true prevailing wage statute since non-union wages are not used in determining the wage rate. Only the wages fixed in collective

bargaining agreements in the locality for the particular craft or trade are used. The result is that the parties who negotiate the collective bargaining agreements also establish the statutory wage rate for public works in the locality. Although this must be viewed as some form of delegation of legislative power to private parties, such delegation is not *per se* unconstitutional. The test is whether the particular delegation is reasonable under the circumstances considering the purpose and aim of the statute. See Note, "The State Courts and Delegation of Public Authority to Private Groups," 67 *Harv. L. Rev.* 1398 (1954); *Ind. Elec. Assoc. of N.J. v. N.J. Bd. of Exam.*, 54 N. J. 466 (1969); *Group Health Insurance of N. J. v. Howell*, 40 N. J. 436 (1963) and 43 *N. J.* 104 (1964); *State v. Hotel Bar Foods*, 18 N. J. 115 (1955).

The statute is entitled to the presumption of constitutionality. While it is argued that the delegation herein also lacks safeguards and creates a danger of arbitrary, self-motivated action by the private parties involved, detrimental to the public good, no such action or result has been shown. As the Appellate Division noted in its opinion, 122 N. J. *Super*, at *p.* 535, the parties negotiating the collective bargaining agreements are competing groups with opposing economic positions so that the agreements reached represent a balancing of interests. Considering the purpose and aim of the statute, it is clear that the delegation here involved meets the requirements of due process.

It is not the judicial function to pass upon the wisdom of the particular means established by the Legislature to fix a prevailing wage rate for public works. As long as due process is satisfied, the legislative formula must be upheld.

Affirmed.

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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1861

ERNEST RENDA CONTRACTING CO., INC.,
a corporation of New Jersey,

Petitioner,

v.

RAYMOND F. MALE, Commissioner, Department of Labor and Industry, State of New Jersey and HILLSBOROUGH MUNICIPAL UTILITIES AUTHORITY, Township of Hillsborough, County of Somerset, State of New Jersey,

Respondents.

MEMORANDUM OPPOSING CERTIORARI

WILLIAM F. HYLAND,
Attorney General of New Jersey,
Attorney for Respondent, Commissioner of Labor and Industry of the State of New Jersey,
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Trenton, New Jersey 08625.

STEPHEN SKILLMAN,
Assistant Attorney General,
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Adams Press Corp., 11 Commerce Street, Newark, N. J.—Market 2-3311-12

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1881

ERNEST RENDA CONTRACTING CO., INC.,
a corporation of New Jersey,
Petitioner,

v.

RAYMOND F. MALE, Commissioner, Department of Labor and Industry, State of New Jersey and HILLSBOROUGH MUNICIPAL UTILITIES AUTHORITY, Township of Hillsborough, County of Somerset, State of New Jersey,
Respondents.

MEMORANDUM OPPOSING CERTIORARI

Respondent, Commissioner of Labor and Industry of the State of New Jersey, represents to the Court as follows:

1. An opinion was rendered and a judgment entered by the Supreme Court of New Jersey in the above entitled cause on January 22, 1974.

2. The petition was filed on May 14, 1974, more than ninety days since the entry of judgment by the Supreme

Court of New Jersey, and the period for applying for a writ of certiorari has not been extended by a Justice of this Court (U.S.C., Title 28, Sec. 2101(c) and Rule 22 of this Court).

THEREFORE, it appears that petitioner's application for a writ of certiorari is out of time and should be denied.

Respectfully submitted,

WILLIAM F. HYLAND
Attorney General of New Jersey
Attorney for Respondent, Commissioner of Labor and Industry of the State of New Jersey

STEPHEN SKILLMAN
Assistant Attorney General
Of Counsel